No. 82-924.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

COLEMAN R. ROSENFIELD AND
GLADYS ROSENFIELD,
PETITIONERS,

v.

NEW ENGLAND MERCHANTS NATIONAL BANK,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Respondent's Brief in Opposition.

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Questions Presented for Review.

1. Where the Court of Appeals has correctly decided and ruled against the petitioners on an affirmative defense, does the failure of the court to formally rule on the same issue also raised as a counterclaim deny the petitioners due process of law where the issue is without merit?

2. Where the petitioners did not introduce any credible evidence in support of their affirmative defenses did the district court err in directing a verdict in favor of the respondent?

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Statement of the Case.

A. *Proceedings Below.*

This action was a suit on a guaranty in which the plaintiff-respondent, New England Merchants National Bank ("bank"),[1]

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[1] New England Merchants National Bank has now changed its name to Bank of New England, N.A. ("bank"). The parent company of the bank is Bank of New England Corporation. Sup.Ct.R. 28.1.

sued the defendants-petitioners, Coleman R. Rosenfield ("Rosenfield") and Gladys Rosenfield ("Mrs. Rosenfield") (collectively "the Rosenfields") for an indebtedness of Mama Tino's, Inc. ("Mama Tino"), a bankrupt corporation, in the amount of $383,340.99 (R. 5-9).[2] Jurisdiction was predicated on 28 U.S.C. § 1332.

Mama Tino's principal shareholders were the Rosenfields and Mr. and Mrs. Nicholas Fiorentino who were also guarantors of Mama Tino's indebtedness to the bank (Tr. 104-105). The Rosenfields acknowledged executing the guaranty (R. 125) but during the course of the proceedings raised numerous affirmative defenses including the defenses that the guaranty was conditionally delivered and induced by fraud (R. 125-126, 556; Tr. 76-77; A. 12-13). Relying on the same facts used to support the defense of fraud, the Rosenfields counterclaimed for fraud in the inducement and sought monetary damages (R. 125-127). Although the counterclaim of fraud was dismissed because it was barred by the statute of limitations (A. 28-29), the defense of fraud was tried to the jury; as with the other defenses, because there was no credible evidence introduced in support thereof, the district court, at the close of all evidence, directed a verdict in favor of the bank (Tr. 76-77; R. 556-558).

B. *Statement of the Facts.*

The principal issue at trial was whether the Rosenfields executed and delivered their guaranty to the bank on the condition that the bank provide Mama Tino with $50,000 of addi-

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[2] References to the Record shall be designated (R.). References to the Transcript shall be designated (Tr.). References to the Appendix of the Petition shall be designated (A.).

tional funding. The Court of Appeals dispassionately and at length recited the material facts (A. 7-13, 19-22), the accuracy of which is not challenged by the petitioners.

The only evidence arguably supporting the Rosenfields' claim that the bank promised $50,000 of additional funding in exchange for their guaranty, was certain self-serving testimony by Rosenfield (A. 19). That testimony at trial was not only uncorroborated, but conflicted with Rosenfield's own conduct, the testimony of every other witness and with the unimpeached documentary evidence.

Fiorentino testified that the guaranties were not conditioned on a new loan being advanced to Mama Tino, but that they were given in exchange for the renewal of the outstanding notes (A. 19; Tr. 267-272). This was confirmed by the testimony of numerous bank officers who testified to the same effect (A. 20; Tr. 197; 216-217, 244-245), and was specifically corroborated by unimpeached documentary evidence in the form of the cover letter from the bank dated February 2, 1970 enclosing the guaranties which were subsequently executed by the Rosenfields and the Fiorentinos on February 6, 1970 (A. 20; Tr. 135-137). The letter stated that the bank had not yet decided on whether to commit further financing but that it needed the guaranties executed before the bank would renew the notes.

Rosenfield's own conduct completely belied his claim that the bank breached a promise of $50,000 of additional funding in February, 1970. In May of 1970, Rosenfield drafted an agreement in which the bank was asked to accept a pro-rata distribution of any funds Mama Tino recovered from Jessup & Lamont, a brokerage firm, for an alleged failure to perfect a public stock offering in exchange for the bank discharging the guarantors (R. 163-167). Indeed, some months earlier, Rosenfield told the bank that he would never release his claim against the brokerage firm since it would be his only source

of income to pay off the guaranty if Mama Tino filed for bankruptcy (Tr. 188-189).

When Mama Tino did file for bankruptcy, Rosenfield filed a proof of claim as a creditor on the basis of the guaranty he had given to the bank (Tr. 153-155). The claim, filed under the penalties of perjury, failed to allege that the guaranty was in any way conditional, notwithstanding that the proof of claim form contained a provision requiring the creditor to list any counterclaims or defenses to the claim (Tr. 154-155).

Finally, there was uncontradicted testimony that at a crucial financial analysis meeting of the Board of Directors of Mama Tino's in April of 1970, there was no mention by Rosenfield that the bank had ever committed itself to making a $50,000 loan. In fact, Rosenfield stated at the meeting that no further bank loans could be negotiated (A. 10, 20; Tr. 142-143; 232-236).

Reasons Why the Writ of Certiorari Should Not be Granted.

The Rosenfields have not sustained their burden of establishing under Supreme Court Rule 17 that there are special and important reasons why the writ should be granted. The decision below is not in conflict with any applicable decision of this Court or of another Court of Appeals on the same matter. Moreover, there is no question of federal law which has not been, but should be, settled by this Court; nor, as will be demonstrated, did the trial court depart from any accepted and usual course of conducting judicial proceedings as would call for an exercise of this Court's extraordinary power of supervision. *See*, Sup.Ct.R. 17.1(a), (c).

The within case is a simple run-of-the-mill suit on a guaranty, which raises no novel questions of law and affects no one except the immediate parties. The decision of the Court of Appeals was largely confined to applying an undisputed set of facts to a well established legal standard to determine whether the district court properly directed a verdict in favor of the bank. Such an opinion hardly warrants further review. *See, National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938) ("Whether respondents . . . are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it".)

I. The Rosenfields were Not Denied Due Process of Law as a Result of the Alleged Failure of the Court of Appeals to Review an Issue Raised on Appeal.

The Rosenfields disingenuously assert, as their principal reason why this Court should review the case, that they were denied due process of law when the Court of Appeals failed to specifically articulate a ruling on the propriety of the action by the district court in granting summary judgment in favor of the bank on the Rosenfields' counterclaim alleging fraud in the inducement. *See* Petition at 11-12. The district court ruled that the fraud counterclaim was barred by the statute of limitations (A. 28-29).

The basis of the fraud counterclaim was that the bank induced the Rosenfields to execute their guaranty by promising to loan Mama Tino an additional $50,000 when the bank never intended to honor its promise (R. 126-127). This is precisely the same argument that the Rosenfields raised as an affirmative defense (A. 12-13; R. 125, 556; Tr. 76-77). Indeed,

the district court expressly permitted the Rosenfields to try this issue (R. 76), and it was only after the Rosenfields put in their case and it became evident that there was no evidence supporting the affirmative defense, that the court granted a directed verdict (R. 556-558).[3] Since the district court correctly directed a verdict on the affirmative defense of fraud, it would have necessarily directed a verdict on the *identical* issue postured as a counterclaim even if the counterclaim were not barred by the statute of limitations. The evidence supporting the defense of fraud was extensively reviewed by the Court of Appeals, and found to be totally insufficient to warrant submission to a jury (A. 19-22). Accordingly, the Court of Appeals discharged its obligation, since the merit of the issue involved in Rosenfields' claim of error was, in fact, carefully considered, and rightfully rejected.

Moreover, the Rosenfields raised literally a plethora of issues on appeal and the Court of Appeals is under no obligation to write a detailed answer to every argument raised by an appellant, especially where the argument is totally lacking in merit. Indeed, an appellant does not even have a right to oral argument, and the Court of Appeals may summarily dispose of a case without rendering any written opinion. *See*, Fed.R.App. P. 34(a); Local Rules 18 and 21 of the United States Court of Appeals for the Fifth Circuit, 28 USCA; *National Labor Relations Board* v. *Amalgamated Clothing Workers of America*, 430 F.2d 966, 967 *et seq.* (5th Cir. 1970); *Isbell Enterprises*,

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[3] As the district court stated:

> At the conclusion of all the evidence, Plaintiff moved for a directed verdict. I concluded that most, if not all, of the defenses were legally insufficient, and even if one or two had some legal validity, they were not supported by any credible evidence. *The deposition testimony on the issues of fraud and conditional delivery consisted only of speculation and supposition.* (R. 557-558) (emphasis supplied.)

Inc. v. *Citizens Casualty Co. of New York*, 431 F.2d 409 (5th Cir. 1970). In effect, all the Court of Appeals did was to deny Rosenfields' claim of error as to the ruling on the counterclaim, and unless the Rosenfields can demonstrate that they were entitled to prevail on their counterclaim, which they were not, the court's failure to discuss the issue in detail is irrelevant.

II. The Trial Court's Conduct did Not Deny Petitioners Due Process of Law.

The Rosenfields contend that the alleged bias of the district court denied them due process of law. The Court of Appeals rejected Rosenfield's claim of bias on the part of the district court by holding, *inter alia*, that since the district court correctly directed a verdict in favor of the bank, any claim of bias is immaterial (A. 23). The court's holding is consistent with the other decisions on point, *see e.g.*, *In re International Business Machines Corp.*, 618 F.2d 923, 930 (2d Cir. 1980) ("If we determined that some adverse rulings were correctly made, obviously they could not be tainted by bias"); *Securities and Exchange Commission* v. *Bartlett*, 422 F.2d 475, 481 (8th Cir. 1970) and the Rosenfields do not contend to the contrary. Accordingly, since their underlying appeal is without merit, the claim of bias on the part of the district court need not be considered since, at best, it would be harmless error. *In re International Business Machines Corp.*, *supra* at 930.

Even considering the claim, there was no reason for the district court judge to recuse himself. Under 28 U.S.C. § 144, disqualifying prejudice or bias must be "personal" *i.e.*, it must stem from something other than an opinion formed by the judge in the course of the proceedings. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Berger* v. *United States*,

255 U.S. 22, 31 (1921). It must have its origins beyond the four corners of the courtroom. The bias alleged by the Rosenfields, even assuming the truth of their claim, was that the court prejudged the case prior to hearing all the evidence. This is a classic example of judicial bias, *i.e.*, bias which is the product of opinions or attitudes developed by the judge during the course of the trial. Judicial bias is not a ground for disqualification. *United States* v. *Grinnell Corp.*, *supra* at 583; *United States* v. *Gordon*, 634 F.2d 639, 641 (1st Cir. 1980); *United States* v. *Hoffa*, 382 F.2d 856, 859 (6th Cir. 1967), *cert. denied*, 390 U.S. 924 (1968). Finally, there was no pervasive bias or prejudice which so permeated the trial as to constitute a limited exception to the "extra judicial" requirement, assuming that such an exception exists. *Davis* v. *Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

In the instant case, the Court maintained even-handed control of the proceedings.[4] Although the judge may have stated

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[3] The following colloquy is but one of the many examples during the trial of the court's impartiality.

> THE COURT (After denying the Rosenfields' motion for disqualification]: It is true I don't believe the testimony of Mr. Rosenfield. But, as I pointed out, I was surprised at the cross-examination of Mr. Cohn, who I thought was doing more for your client than you possibly could have done for him because he asked the "why" question all of the time and permitted Mr. Rosenfield to answer these questions.
>
> Mr. Rosenfield's case now is better than it ever has been as a result of his examination.
>
> MR. GREER (Defendant's Counsel): Your Honor, I would agree with that.
>
> THE COURT: He was helping you. I was somewhat surprised at his type of cross-examination which permitted Rosenfield to go into questions that he never could have gone into had Mr. Cohn not asked him those questions.
>
> So, I am going to deny your motion.
>
> MR. GREER: Your Honor, there was no disrespect intended.

that he did not believe Rosenfield's testimony (Tr. 132), such a statement made outside the presence of the jury does not establish grounds for recusal. *See, United States* v. *Azhocar*, 581 F.2d 735, 740-741 (9th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979).

Finally, the procedural requirements for disqualifying a judge on grounds of prejudice and bias are well settled and set forth in 28 U.S.C. § 144. That statute requires a party claiming bias to file an affidavit together with a certificate of good faith by his counsel. The statutory requirements for disqualifying a trial judge must be strictly followed to safeguard the judiciary from frivolous attacks upon its dignity and integrity and to ensure the orderly functioning of the judicial system. *United States* v. *Womack*, 454 F.2d 1337, 1341 (5th Cir. 1972). In the case at bar, the Rosenfields filed neither an affidavit nor a certificate of good faith. Accordingly, they are deemed to have waived this claim of error. *Galella* v. *Onassis*, 487 F.2d 986, 997 (2d Cir. 1973).

THE COURT: That's perfectly all right. *As far as Mr. Rosenfield is concerned, I don't believe him. I am constantly hearing cases in which I don't believe a party.*

If a lawyer wants to ask foolish questions, I'm going to let him do it. I resolved that in this case. If a person wants to ask him why he did certain things, I'm going to let him do it. I will let you do it too. I think once I make a ruling, I want you to abide by it. *If I was trying to do Mr. Rosenfield any harm, I would have stopped Mr. Cohn, but I didn't.* I saw you were looking like the cat that ate the canary when he was asking these questions.

MR. GREEN: Your Honor, I prefer not to comment on that (Tr. 172-174; *see also*, Tr. 165) (emphasis supplied).

III. In Light of the Overwhelming Undisputed Testimony and Evidence, Rosenfield's Self-serving Testimony did Not Warrant Jury Consideration.

It has long since been settled that the directed verdict standard does not violate the Seventh Amendment guaranty of a right to trial by jury. *Galloway* v. *United States*, 319 U.S. 372, 389 (1943); *Boeing Company* v. *Shipman*, 411 F.2d 365, 373 (5th Cir. 1969). Equally well settled is the notion that self-serving testimony which either flies in the face of unimpeachable contradictory evidence or which does not bear the light of analysis does not create a jury question. *United States* v. *Generes*, 405 U.S. 93, 106 (1972); *Ralston Purina Co.* v. *Hobson*, 554 F.2d 725, 728-729 (5th Cir. 1977). The Rosenfields do not challenge these principles of law but merely their application to the facts of this case. As previously mentioned, it is inappropriate and unnecessary for this Court to undertake the same factual analysis as the Fifth Circuit. *General Talking Pictures Corp.* v. *Western Electric Co.*, *supra* at 178.

Contrary to the petitioners' characterization of the evidence, this was not simply a credibility dispute between contradictory testimony of witnesses as to whether the bank promised additional funding in exchange for the guaranties. Rather, Rosenfield's own conduct and testimony about what transpired during the relevant time period is so utterly inconsistent with his later uncorroborated testimony concerning the existence of a promise of funding as to require that his subsequent testimony be disbelieved. Moreover, when Rosenfield's testimony is coupled with the unimpeached documentary evidence and the unbiased testimony of neutral third parties, it becomes evident that Rosenfield's testimony concerning the alleged conditional nature of the guaranty was nothing but an afterthought which "does not bear the light of analysis". *United States* v. *Generes*, *supra* at 106; A. 19. In light of the

overwhelming effect of the evidence, the Court of Appeals correctly concluded that the district court was not only authorized but obligated to direct a verdict in favor of the bank (A. 19).

IV. The District Court did Not Abuse its Discretion in Excluding Deposition Testimony.

The Rosenfields attempted to introduce the deposition testimony of Carl Schaeffer, an attorney for Butler's Bank. At best, the testimony indicated that in May of 1970 Schaeffer had several conversations with a bank officer who told Schaeffer that the bank had finally decided, *i.e.*, decided in May of 1970, to commit additional funding to Mama Tino. The trial court excluded the testimony on grounds that the evidence was irrelevant and prejudicial (Tr. 55-56) and the Court of Appeals affirmed (A. 19 n.11). On appeal, the Rosenfields reiterate the same argument unsuccessfully pressed below that the testimony was relevant and the exclusion is grounds for reversal by this Court.

A trial court is given wide latitude in ruling on questions of relevance, and absent a clear showing of an abuse of discretion such a ruling will not be disturbed on appeal. *United States* v. *Wyers*, 546 F.2d 599, 603 (5th Cir. 1977). As the Court of Appeals correctly observed: "What [bank] officers might have said in May [of 1970] about a possible loan to Mama Tino obviously had no bearing on whether in the preceeding February or April the bank promised to make a $50,000.00 loan in exchange for the guaranties in issue. . . ." (A. 19 n.11.)

This ruling is in accord with generally accepted black letter law, *see, Anderson* v. *Merchants and Miners State Bank*, 161 Ga. 12, 129 S.E. 650, 652 (1925) (evidence as to probable state of mind of maker of note after its execution is irrelevant to

establish his intention at the time he executed note); 29 Am.Jur.2d, Evidence § 245 (1967). There was no abuse of discretion.

Conclusion.

Neither the district court nor the Court of Appeals committed any arguable error which would warrant this Court's review. Indeed, a review of the record indicates that this is a garden-variety collection case in which the petitioners are using a petition to this Court as yet another delaying tactic to avoid paying the judgment. For all of the aforesaid reasons the Court should deny the petition for writ of certiorari and because the petition is frivolous, the Court should award the bank appropriate damages. *See*, Sup.Ct.R. 49.2.

Respectfully submitted,

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